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SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Summary No. 39 September 1948

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RAILWAY EXPRESS AGENCY, INC. - A COOPERATIVE

In the case of Railway Express Agency, Inc., v. Commissioner of Internal Revenue, 8 T.C. ______ _, it appeared that the Agency was incorporated in 1928 in Delaware "to engage as agent or otherwise in the express transportation business."

"The total authorized capital stock was 1,000 shares without par value. The certificate of incorporation provided against the transfer of stock of petitioner, other than to a successor corporation by consolidation, merger, or purchase, without first offering the shares to petitioner for purchase at the issuing price and against the holding of stock, as far as might be legal, by other than railroad corporations. It also authorized petitioner to engage in a great number of activities other than the transportation of express, including to engage in any kind of manufacturing business; to deal in copyrights and patents; to deal in stocks and securities; to loan money; to enter contracts of every kind; and to carry on any business calculated directly or indirectly to promote the interests of the corporation or enhance the value of its properties.

"The bylaws of petitioner provided for the election by stockholders of 15 directors, 14 of whom were to be nominated by 3 specified geographical districts. The method of selecting directors was not to be changed without the consent of the holders of two-thirds of the stock of petitioner. The board of directors was authorized to manage the business of petitioner."

The tax returns of Railway Express Agency, Inc., for the years 1937 and 1938 were involved in this proceeding. In 1937, the Agency paid $93.54 in income taxes, and $391.25 in excess profit taxes; in 1938, it paid $13,966.14 in income taxes, and excess profit taxes of $10,449.89. The Commissioner of Internal Revenue determined that the Agency had taken excessive depreciation on its property for the tax years 1937 and 1938, and on account of this fact sought to recover additional taxes from the Agency. Apparently, the Agency then filed a petition asking that a finding be made that there was no deficiency in its income and excess profits taxes for the years 1937 and 1938, and requesting a ruling that it had overpaid its income and excess profits taxes for those years by the exact amounts which it had paid. The Court said:

> "The primary question presented is whether any portion of the receipts of the business conducted by petitioner constituted income of the petitioner subject to income and excess profits tax, which in larger part involves the question whether the respondent erred in adding to the petitioner's income the amounts of depreciation disallowed for the respective years."

The following statement from the Court shows the amount of the additional taxes which the Agency was required to pay:

> "This case involves deficiencies in income taxes for the calendar years 1937 and 1938 in the respective amounts of $121,369.66 and $45,943.17 and deficiencies and in excess profits taxes for the same years in the amounts of $46,079.28 and $32,973.56, respectively. The Commissioner determined the above deficiencies by adding to petitioner's reported income for 1937 and 1938, respectively, the sums of $383,994.07 and $274,779.70, as 'depreciation decreased' and 'excessive depreciation.'"

The position of the Agency was that no part of its receipts constituted taxable income. In other words, it contended that because of the way in which it was organized and operated, it had neither income nor excess profit taxes to pay.

The Railway Express Agency was specifically barred from the payment of dividends on its stock by the terms of its organization papers. All its stock was held by about 70 railroads, on whose lines 85 percent of its business originated. Under the form of organization, the stock did not represent any substantial equity in the property of the corporation but merely the voting rights, and distribution of earnings was not to be made upon a stock basis but in accordance with a standard form of contract. The Agency entered into uniform contracts with 400 railroads, including the 70 railroads which held stock therein. Under the terms of the uniform contracts entered into by the Agency with the 400 railroads, the earnings of the Agency from the express business over and above the operating and maintenance expenses were to be distributed among the 400 railroads as compensation for service rendered by them in conducting the transportation business of the express agency. One of the stipulations of this contract was that the railway upon which originated a carload express shipment was to receive 85 percent of the gross revenue accruing on its lines.

The original plan of organization contemplated that the property required by the Agency for the conduct of its business would not be purchased with money arising from the sale of its stock, but would be largely, if not wholly, acquired with borrowed money.

In pursuance of authority conferred by the Interstate Commerce Commission which approved the organization of Railway Express Agency, Inc., 150 I.C. 423, bonds in the total amount of $32,000,000 were sold, and the proceeds used for acquiring property. The board of directors of the Agency provided for the retirement of these bonds by taking action which resulted in the Agency's "borrowing" from each of the 400 railroads amounts of money which would otherwise have been paid to them in cash, and using this money for the retirement of the bonds. Apparently, this action, in the opinion of the Tax Court, did not result in

any liability for taxes by the Agency, and from the opinion in this case, it would appear that the amounts which were thus borrowed by the Agency from each of the 400 railroads were excludable in computing the liability of the Agency for income taxes. Interest was paid by the Agency to each of the railroads on the amounts which were borrowed from them in the manner just outlined.

The excessive depreciation which the Commissioner of Internal Revenue and the Tax Court of the United States found had been taken by the Agency resulted from the fact that the uniform contracts entered into by the Agency with each of the 400 railroads prescribed that depreciation was to be taken on the property of the Agency in accordance with rules with respect to depreciation prescribed by the Interstate Commerce Commission. The Commissioner of Internal Revenue found that depreciation thus taken was excessive, and that it was not taken in accordance with rules with respect to depreciation followed by the Bureau of Internal Revenue. It appeared that in 1945, "the Interstate Commerce Commission gave permission to account for depreciation charges on the basis found by the Bureau of Internal Revenue, retroactive to January 1, 1937, and so covering the taxable years." However, the Railway Express Agency did not revise the deductions taken by it for depreciation in accordance with the rules of the Bureau of Internal Revenue. In this connection, the Court said in referring to Railway Express Agency, Inc.:

> "It has refrained from revising, in this depreciation matter, its accounts with the contracting railroads. This proceeding was pending at the time the situation was under discussion, and questions are pending between the petitioner and the Bureau of Internal Revenue. In other words, the petitioner has left the contractual rights of itself and the contracting railroads as they were when petitioner deducted depreciation under Interstate Commerce Commission rules. It seems to us that the question as to whether petitioner might be required by the contracting railroads to revise its depreciation deductions for 1937 and 1938, under the Interstate Commerce Commission order of 1945 is, to say the least, an open one; and particularly that petitioner has advisedly left it open in this case, leaving itself in the position of having deducted depreciation for 1937 and 1938 according to the then rulings of the Interstate Commerce Commission and in strict accordance with its contractual right. A taxpayer receiving income under claim of right and without restriction as to disposition, is taxable thereon, even though he may later be required to return it. North American Oil Consolidated v. Burnet, 286 U.S. 417; National City Bank, Executor, v. Helvering, 98 Fed. (2d) 93; Board v. Commissioner, 51 Fed. (2d) 73; Safety Tube Corporation, 8 T.C. ____ (Apr. 2, 1947), where the claim was in litigation. This we consider petitioner's position as the owner of the depreciated property, and even

though there may be some liability to revise the matter later--and the words of the contract might be construed as strong basis for petitioner's denial of any such revision--that is not for us to consider controlling as to the years 1937 and 1938. Moreover, the provisions of the contract with reference to any revision are general in their nature and subject to question as to the time within which such revision may be applied. Thus, article XVIII of the contract provides for objections to deductions within a reasonable time; also provides against retroactive effect to actual expenses already paid or incurred as being unnecessary or excessive, though it provides also that estimates and accruals (which would include estimates and accruals as to depreciation rates), agreed to by the petitioner as excessive, may be adjusted from the dates thereof. Obviously, there is real question as to the rights of the parties, the petitioner and the contracting railroads, as to revision of the deductions taken by the petitioner in the taxable years. The depreciation, already deducted, might not be regarded as merely estimated, or the petitioner might not agree that it was excessive. The operations contracts, article v, section 4, contain in detail the provisions above examined, as to revenues and expenses to be deducted therefrom; article v, section 5, provides in general terms for final settlement at termination of the agreement by the general accounting officers of the parties, or if they fail to agree, as provided in article XIV; and article XIV in turn provides in general for arbitration of disputes on request 'and the decision of a majority of such arbitration board shall be a condition precedent to <u>any further action</u>.' (Italics supplied.) Thus it appears that there may be litigation--'further action'--between the parties, and we can not now say that the matter of the depreciation will ever be revised. In view of the question as to the relation between petitioner and the contracting railroads as to any revision of accounts, we may not properly be required to speculate upon the attitudes and contentions which might be raised between the parties in the future. Under the principles of the cases last cited, we consider that we should not anticipate the possibility of any revision. We therefore conclude and hold that the Commissioner did not err in adding to petitioner's income as reported, the agreed amounts of excessive deductions for depreciation." (Underscoring added.)

Obviously, the effect of the Railway Express Agency's taking excessive depreciation was to cut down and thus reduce the amounts payable by the Agency to each of the 400 railroads as compensation for services rendered by them in the transportation business. Clearly, this operated to reduce the amount of taxes which might be paid by each of the 400 railroads because the income of each of the 400 railroads was reduced by reason of the excessive depreciation taken. Amounts payable to each of

the 400 railroads by reason of the uniform contract were held to be deductible by the Tax Court as an expense of operating the business of Railway Express Agency, Inc.

Attention is called to the fact that no deductions may be taken in computing income taxes except those which have been authorized by Congress. Deductions are purely a matter of legislative grace. The Internal Revenue Code, in Section 23, provides however for the deduction of "ordinary and necessary expenses." It is clear from the holding of the Tax Court that if depreciation had been taken by the Agency in accordance with the rules of the Bureau, and if the amount of the excessive depreciation had been paid by the Agency to the 400 railroads as compensation, no income taxes would have been payable by the Agency on account of the amounts in question. In 1937, the Agency paid to the 400 railroads about $58,000,000 "and $50,000,000 in 1938 was claimed in the returns as deductions in Account No. 104" in arriving at revenue from transportation. In other words, these amounts were deducted in determining the income taxes of the Agency for the years in question, and if these amounts had been increased by the amounts covered by the excessive depreciation, there would have been no basis for the claim by the Commissioner of Internal Revenue that the Agency had underpaid income and excess profits taxes for the years 1937 and 1938.

Exempt, as well as nonexempt, cooperative associations should take depreciation on their property in accordance with principles that are acceptable to the Bureau of Internal Revenue. If an exempt association takes excessive depreciation, a question arises as to whether it is eligible for exemption from the payment of Federal income taxes because it has deducted more than the expenses which it incurred in the year in question from the receipts for that year. Again, if an exempt association for any reason is found to be nonexempt, and it has taken excessive depreciation, it is clear that the income taxes which it might be required to pay would undoubtedly be increased on account of the excessive depreciation which it had taken.

CONTRACT VIOLATING ROBINSON-PATMAN ACT UNENFORCEABLE

In the case of Rathke, et al., v. Yakima Valley Grape Growers Association, et al., decided by the Supreme Court of Washington, 192 P. 2d 349, it appeared that the association had entered into a contract with Clark E. Rathke, doing business as Rathke and Company, under which the association agreed to purchase "all the machinery, equipment, materials and supplies to be used in producing grape juice or other products at first party's plant at Grandview, Washington, for a period of ten years."

It also appeared that the association had entered into another contract with the Clarke-Donelson Company "and under its terms first party, for a period of ten years, agreed to sell to second party so much of first party's output of grape juice or other products as second party might from time to time require or order, subject to certain restrictions contained in the contract, among which was the right of the Association to sell fifty percent of its own output."

Suit was brought against the association for damages for the alleged breach of the two contracts and to enforce the specific performance of both contracts.

The illegality of the contracts under the Robinson-Patman Act was not pleaded, but at the conclusion of the taking of the testimony in the trial court, the defendants contended that the plaintiffs should not recover because the contract under which the association agreed to sell grape juice or other products to the Clarke-Donelson Company violated the terms of that Act. Under this contract, the Clarke-Donelson Company was authorized to act as a broker for the association in the sale of products of the association, but that company was also authorized to purchase for its own account 50 percent of the manufactured products of the association, and with respect to the products purchased for its own account, the contract provided that it was also entitled to a brokerage. In regard to this matter, the Court said in part:

> "We come then to the main question in the case, which is whether the trial court, in the light of the evidence, was justified in holding that the Donelson Co. contract was an illegal contract, under the provisions of the Robinson-Patman Act, 15 U.S.C.A. par. 13, subd. (c), which reads:
>
> "'It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent,

representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.'

"The Robinson-Patman Act of June 19, 1936, was an amendment of the Clayton Anti-trust Act of October 15, 1914, 38 Stat. 730. Section 2 of the Clayton Act, which was the section amended, merely forbade discrimination in price, when the effect of such discrimination was to substantially lessen competition or tend to create monopoly. The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown.

"Section 13, of 15 U.S.C.A., supra, contains subdivisions (a), (b), (c), (d), (e), and (f).

"A brief discussion of par. 13, contained in Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 3 Cir., 106 F. 2d 667, 676, is, we think, helpful to a clearer understanding of the overall purpose of the act. We quote:

"'Paragraph (a) deals with the selection of customers and provides that it shall be unlawful to discriminate in price between them. Then follow the cost differential provisos upon which the petitioner relies. Paragraph (b) provides that the burden of rebutting a prima facie case of discrimination rests upon the person charged with a violation of the Section. Paragraph (c) prohibits the payment or acceptance of commission or brokerage or other compensation, except for services rendered, as we have indicated. Paragraph (d) provides that it shall be unlawful to pay or contract for the payment of anything of value for services or facilities unless such payment or consideration is available on proportionally equal terms to all other customers competing in distribution of such products or commodities. Paragraph (e) prohibits the furnishing of services or facilities for processing or handling upon terms not accorded to all purchasers on proportionally equal terms. Paragraph (f) prohibits persons from knowingly receiving a discrimination in price prohibited by Section 13.'

* * * * * *

"We are of the opinion that, under the plain terms of the contract, Donelson Co., as buyer, was given a

brokerage. We are also of the opinion that the Robinson-Patman Act, 15 U.S.C.A. par. 13(c), absolutely prohibits and forbids the paying, or granting, or receiving, or accepting anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, from seller to buyer. Oliver Bros. v. Federal Trade Commission, 4 Cir., 102 F. 2d 763; Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, supra; Jarrett v. Pittsburgh Plate Glass Co., 5 Cir., 131 F. 2d 674, 676. We quote from the last cited case:

"'It [Robinson-Patman amendment of the Clayton Anti-Trust Act, 15 U.S.C.A. par. 13(c)] prohibited receipt or payment of commissions or discounts in lieu thereof in sales transactions except for services rendered.'

"See, also, Southgate Brokerage Co. v. Federal Trade Commission, 4 Cir., 150 F. 2d 607,609, from which we quote:

"'It is perfectly clear that this provision [Robinson-Patman Act, 15 U.S.C.A. par. 13(c)] forbids the payment of brokerage on a sale or purchase of goods to the other party to the transaction. The seller may not pay the buyer brokerage on the latter's purchases for his own account. As said in the Report of the House and Senate Conference Committee with reference to this subsection (House Rep. 2951, 74th Cong. 2d Sess.): "This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer * * *."'" (Underscoring added.)

Because the Court found that the contract for the purchase of machinery by the association and the contract for the sale of products of the association were dependent upon each other, the Court held both contracts invalid. In this connection, the Court said:

"An examination of the two contracts will show that the one is dependent on the other. The sales agreement states that

'Whereas, First Party has, by a separate and independent agreement, arranged to obtain certain equipment for said grape juice plant from Clark E. Rathke, doing business as Rathke and Company, and in said written agreement it is provided that First Party herein shall enter into this agreement as a part of the consideration for Clark E. Rathke,

executing said written agreement to furnish said equipment.' (Underscoring added.)

"It seems to us that if the sales agreement is illegal and void and cannot be enforced, there is a failure of consideration of the purchase agreement.

"The general rule in regard to illegality of consideration and its effect upon a contract is stated in Remington Rand, Inc. v. International Business Mach. Corp., 167 Misc. 108, 3 N.Y.S. 2d 515, 523, as follows:

"'It is well settled that a contract wholly based on an illegal consideration is wholly unenforcible. At times, however, a contract may be divisible by reason of its containing both legal and illegal provisions. A separation of the two will be attempted by the courts in a proper case, but where the illegality pervades the entire agreement, the courts will abstain from such separation and refuse affirmative relief. Saratoga County Bank v. King, 44 N.Y. 87; Arnot v. Pittston & Elmira Coal Co., 68 N.Y. 558, 23 Am. Rep. 190; Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559, Ann. Cas. 1918E, 247.'

"We are of the opinion that, the sales agreement being illegal and unenforceable, the purchase agreement for the machinery and supplies, which is dependent upon it, is also unenforceable."

As indicated, the Supreme Court of Washington held that the plaintiffs were not entitled to recover damages under either of the contracts in question because one of the contracts on its face violated the Robinson-Patman Act, and that as each contract was dependent upon the other it resulted in each being unenforceable.

In the case of <u>Bruce's Juices, Inc.</u>, v. <u>American Can Company</u>, 330 U.S. 743, the Supreme Court of the United States held in a five to four decision that alleged price discrimination by the American Can Company under the Robinson-Patman Act could not be successfully asserted as a defense against a suit brought on renewal notes given by Bruce's Juices, Inc., to the American Can Company, which notes represented an accumulated balance remaining on a running account of sales and credits extending over a period of years. Apparently, the fact that the suit was based upon renewal notes was a factor in causing the Court to hold that a suit could be successfully maintained upon them. Attention was called by the Court to the fact that Bruce's Juices, Inc., had already instituted a suit for triple damages under the Robinson-Patman Act for damages on account of alleged price discriminations by the American Can Company.

It should be remembered that the Robinson-Patman Act is a part of the anti-trust laws of the United States, and that for a violation of that Act proceedings may be instituted by the Federal Trade Commission. Actions for triple damages may be instituted by any person who is injured in his business by reason of a violation of the Act. Also, a violation of the Act is a crime, and upon conviction, a violator may be fined or imprisoned. In addition, as pointed out above, in some circumstances at least a violation of the Robinson-Patman Act may operate to render a contract unenforceable.

Every cooperative association in selling or buying in interstate commerce should keep in mind that it is subject to the Robinson-Patman Act the same as any other concern, and care should be exercised to see to it that its contracts of sale or purchase are consistent with the terms of that Act.

The Federal Trade Commission instituted proceedings under the Robinsom-Patman Act against the Morton Salt Company, and following a hearing issued a cease and desist order requiring the discontinuance of its quantity discount system. The Morton Salt Company then appealed to the Circuit Court of Appeals, which set aside the order of the Federal Trade Commission. The Commission then carried the case by certiorari to the Supreme Court of the United States, which reversed the Circuit Court of Appeals. (Federal Trade Commission v. Morton Salt Company, 68 S. Ct. 822)

Section 2 (a) of the Robinson-Patman Act provides in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The Supreme Court sustained the finding of the Federal Trade Commission that the Morton Salt Company had discriminated in price between different purchasers of like grades and quantities in violation of the statutory language quoted above and subject to certain relatively minor modifications upheld the order of the Commission.

The following quotation is taken from the opinion of the Supreme Court:

> "Respondent manufactures several different brands of table salt and sells them directly to (1) wholesalers or jobbers, who in turn resell to the retail trade, and (2) large retailers, including chain store retailers. Respondent sells its finest brand of table salt, known as Blue Label, on what it terms a standard quantity discount system available to all customers. <u>Under this system the purchasers pay a delivered price and the cost to both wholesale and retail purchasers of this brand differs</u>

according to the quantities bought. These prices are as follows, after making allowance for rebates and discounts:

	Per case
Less-than-carload purchases.	$1.60
Carload purchases.	1.50
5,000-case purchases in any consecutive 12 months.	1.40
50,000-case purchases in any consecutive 12 months.	1.35

"Only five companies have ever bought sufficient quantities of respondent's salt to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country. As a result of this low price these five companies have been able to sell Blue Label salt at retail cheaper than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.

"Respondent's table salts, other than Blue Label, are also sold under a quantity discount system differing slightly from that used in selling Blue Label. Sales of these other brands in less-than-carload lots are made at list price plus freight from plant to destination. Carload purchasers are granted approximately a 5 percent discount; approximately a 10 percent discount is granted to purchasers who buy as much as $50,000 worth of all brands of salt in any consecutive twelve-month period. Respondent's quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused.

"In addition to these standard quantity discounts, special allowances were granted certain favored customers who competed with other customers to whom they were denied.

"First. Respondent's basic contention, which it argues this case hinges upon, is that its 'standard quantity discounts, available to all on equal terms, as contrasted for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory, within the meaning of the Robinson-Patman Act.' Theoretically, these discounts are equally available to all, but functionally they are not. For as the record indicates (if reference to it on this point were necessary) no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some

of their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts, even those based on carload shipments. <u>The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price</u>." (Underscoring added.)

Referring to the legislative history of the Robinson-Patman Act, the Court said:

"And it was in furtherance of this avowed purpose--to protect competition from all price differentials except those based in full on cost savings--that par. 2(a) of the amendment provided '<u>That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered</u>.'

"The foregoing references, without regard to others which could be mentioned, establish that respondent's standard quantity discounts are discriminatory within the meaning of the Act, and are prohibited by it whenever they have the defined effect on competition. See Federal Trade Comm. v. Staley Co., 324 U.S. 746, 751, 65 S. Ct. 971, 973, 89 L. Ed. 1338." (Underscoring added.)

The Supreme Court referred to certain provisos in the order of the Federal Trade Commission and said:

"The provisos in (a) and (b) present a more difficult problem. They read: 'Provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure or destroy competition among such wholesalers [retailers]' The first clause of the provisos, but for the second qualifying clause, would unequivocally permit respondent to maintain price diffentials of less than five cents as between competing wholesalers and as between competing retailers. This clause would appear to benefit respondent, and no challenge to it, standing alone, is here raised. But respondent seriously objects to the second clause of the proviso which qualifies the permissive less-than-five-cent differentials provided in the first

clause. That qualification permits such differentials only if they do 'not tend to lessen, injure, or destroy competition.' Respondent points out that where a differential tends in no way to injure competition, the Act permits it. 'The Commission,' so respondent urges, 'must either find and rule that a given differential injures competition, and then prohibit it, or it must leave that differential entirely alone.' Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying clauses require consideration.

"One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired, if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C.A. par's. 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

"Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide. But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials, it could not then shift to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission. (Underscoring added.)

The Court held that the order of the Federal Trade Commission should be modified to meet the objection just outlined.

This decision by the Supreme Court of the United States seems to establish that quantity discounts at least to competing purchasers in interstate commerce are not legal unless the savings effected

mathematically justify the discount. In other words, quantity discounts, simply as quantity discounts, would seem to be barred whether the discounts in question involve carload lots or not.

The Robinson-Patman Act is a part of the anti-trust laws of the United States and is as applicable to a cooperative association as to any other business concern. Cooperative associations, like other business concerns, are subject to the rule against quantity discounts not based on savings effected.

APPOINTMENT OF RECEIVER FOR ASSOCIATION UNJUSTIFIED

The case of Indianapolis Dairymen's Cooperative, Inc., et al., v. Bottema, et al., decided by the Supreme Court of Indiana, 79 N.E. 2d 399 (See also 79 N.E. 2d 409), was an appeal "from an interlocutory order of the trial court appointing a receiver for Indianapolis Dairymen's Cooperative, Inc., pendente lite." Certain members of the cooperative alleging mismanagement filed a suit against the cooperative for an accounting, for the immediate appointment of a receiver, and for an injunction against alleged improper expenditures; and as indicated succeeded in having a receiver pendente lite appointed by the trial court. The cooperative then appealed and obtained a reversal. The Appellate Court emphasized the reluctance that should be exercised in the appointment of receivers. In this connection, the Court quoted the following with approval:

> "The power of appointment is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergancy, and in a clear case, or in a case of 'extreme necessity,' where it appears that the appointment is necessary either to prevent fraud or to save the property from injury or threatened loss, or destruction, and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. This is the rule with respect to injunctions; it applies a fortiori with respect to the appointment of a receiver.
>
> "The same rules are enunciated in Pomeroy's Equity Jurisprudence (4th Ed.) par. 1484 et seq., where it is said that the power should be exercised with great caution and never indulged unless the danger of loss or injury is imminent. 'A receivership is not a panacea for all business ills. The remedy may be worse than the disease. Even the suggestion of a receivership, as all know, may cause capital to hide in its shell.' As one court has expressed it, 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.'" 16 Fletcher Cyc., Corporations, Perm. Ed., par. 7697, pp. 90-93.

The charges of mismanagement were based upon a number of different acts and situations. Complaint was made that the officers and directors of the cooperative had failed to convince the Office of Price Administration that it was entitled to higher prices for its products. The Court specifically held that this was not cause for appointment of a receiver. It also held that the failure of officers and directors to allow the stockholders to examine the books of the cooperative was not grounds for the appointment of a receiver, since there were other adequate remedies, such as mandamus, by means of which the stockholders could obtain the right to examine the books. It

further held that the failure of the corporation to file annual reports did not operate to forfeit the charter of the cooperative or revoke its right to do business at least until the State acts to penalize the cooperative for failing to file reports in accordance with the statute. It appeared that the required reports were later filed by the cooperative.

The Appellate Court further held that the operation of a breeding farm by the cooperative was clearly within the broad powers conferred upon the cooperative. Apparently, the complaining members of the association alleged that the cooperative had acted improperly in paying to withdrawing members their part of the reserve fund. In this connection, the Court said:

> "The evidence was uncontradicted that when any member withdrew from the corporation and requested his share of the reserve funds he was paid without delay, but if no demand or request was made the funds remained with the corporation. There was no evidence that the corporation could not promptly meet every demand of a withdrawing member for his share of the surplus, or that the corporation would be insolvent or in imminent danger of insolvency or embarrassed financially if all former members should concurrently make demand for their share of the reserve. The prudent amount of reserve funds to be maintained by the corporation was for the determination of its board of directors, and no abuse of that discretion has been shown."

The fact that there was dissension among the members did not amount to a cause for the appointment of a receiver, and in support of this conclusion the Court said:

> "The fact that there was dissension among some of the members as to the management of the corporation is not ground for the appointment of a receiver where the corporation is solvent and the business is prosperous. High, Receivers, par. 292, p. 348, par. 295a, p. 353; 2 Clark, Receivers, 2d Ed., par. 742, p. 1095. The management of the corporation was vested in the directors and officers, and there was no evidence of any dissension in the management.
>
> "'A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow

corporators. The jus dispondendi is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large.' 2 Clark, Receivers, 2d Ed. par. 742, pp. 1095, 1096.

"If a majority of the members are merely dissatisfied with the management, it can be changed at the next annual election.

"'One who buys stock in a corporation takes it subject to the right of the majority stockholders to elect the officers and control the company and its property. That is the very essence of a corporation. * * *

"'We know of no statute which authorizes a decree of dissolution merely because of a disagreement between the stockholders as to who shall hold the offices and how the business shall be conducted.' Enterprise, etc., Pub. Co. v. Craig, 1924, 195 Ind. 302, 308, 144 N.E. 542, 544, 145 N.E. 309."

The Court further held that:

"Before mismanagement and misconduct alone can be cause for the appointment of a receiver, they must be so gross or fraudulent as to affect the substantial rights of stockholders or creditors. 16 Fletcher Cyc., Corporations, Perm. Ed., par. 7714, p. 130; Allied Magnet Wire Corp. v. Tuttle, 1927, 199 Ind. 166, 154 N.E. 480, 156 N.E. 558, 50 A.L.R. 252."

It was also contended that the cooperative was deducting 6 cents per hundred pounds of milk instead of 5 cents which it was authorized to deduct, and which was used for advertising to increase the consumption of milk. But the Court held this would not justify the appointment of a receiver, but that it was simply a breach of contract, and there was no evidence that the corporation was not financially able to pay or refund any amounts which they might have deducted in excess of those authorized by the contract. In this connection, it should be remembered that where a cooperative marketing contract specifies the amount of deductions that may be made, the association is restricted to making deductions of not in excess of those authorized. The fact that the officers and directors may be of the opinion that additional amounts of money are needed does not authorize the cooperative to deduct amounts over and above those authorized to be deducted by the terms of the contract.

The Court further held that there was no duty on the part of the cooperative or any officer or employee thereof to furnish any stockholder with a copy of the articles of incorporation of the cooperative, which are a matter of public record. In respect to furnishing a stockholder with a copy of the bylaws, the Court, however, specifically held that mandamus would lie to compel the cooperative to furnish a stockholder with a copy of its bylaws.

CONTRACT OF GUARANTY - ULTRA VIRES

In the case of 24 East Sixth Street Corporation v. Co-operative Pure Milk Association, decided by the Court of Common Pleas of Ohio, Hamilton County, 79 N.E. 2d 239, the plaintiff brought suit against the association to obtain a judgment against defendant on its guaranty as surety for prompt payment of all rent and performance of all covenants and agreements of a lease entered into by the plaintiff with a third party. The association pleaded that:

> "As a second defense defendant alleges it is a co-operative agricultural association under the laws of Ohio and after stating in detail the purposes of defendant corporation, defendant alleges that it was outside of the power of defendant corporation to execute the guaranty referred to in the second amended petition and that it was ultra vires and outside the corporate powers of defendant to become surety on the lease of another corporation."

It appears that prior to the enactment of the General Corporation Law of Ohio in 1927, a corporation had no power to enter into contracts of guaranty or surety, or otherwise lend its credit to another unless expressly authorized to do so by its charter or by statute except where power to do so may be implied from its express power as necessary and proper in furtherance of its business.

The Cooperative Act of Ohio, under which the association was incorporated, was enacted before the General Corporation Act of Ohio of 1927. The Cooperative Act does not authorize an association incorporated thereunder to enter into contracts of guaranty. The plaintiff attempted to establish that the authority conferred by the General Corporation Act of Ohio on corporations incorporated under that Act was also applicable to cooperative associations formed under the Cooperative Act by reason of the fact that the Cooperative Act, after enumerating powers specifically conferred upon cooperative associations, concluded as follows:

> "and in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere."

The Cooperative Act also contained the following provision:

> "Any provisions of law which are in conflict with this act shall be construed as not applying to the associations herein provided for."

The Court in holding that the cooperative association was not authorized to enter into a contract of guaranty said in part:

> "Likewise, by Section 28 of said Act (Section 10186-28) it is stated:
>
> 'The provisions of the general corporation laws of this State and all powers and rights thereunder, shall apply to the association organized hereunder, <u>except where such provisions are in conflict with or inconsistent with the express provisions of this act</u>.'
>
> "This Court is clearly of opinion that the right of guaranteeing the performance of the provisions of a lease made by lessor to a third party or corporation is not one of the powers conferred upon co-operative agricultural associations under the provisions of General Code Section 10186-4 and any such power or right which other corporations have under the General Corporation laws of this State '<u>are in conflict with or inconsistent with the express provisions of [said] act</u>.'
>
> * * * * *
>
> "Finally, in the opinion of this Court, in view of the Legislature of Ohio having by express provisions authorized the incorporation of co-operative agricultural associations and having prescribed all the powers and limitations of such corporations, the provisions of the General Corporation Act subsequently passed should not be held to amend any of such provisions unless expressly provided."

In the case of Meyers v. Wells, decided by the Supreme Court of Wisconsin, 31 N.W. 2d 512, it was said:

> "The corporation was not in existence at the time the contract was entered into but it was a contract made by one of the promoters in the interest of the future corporation and constituted an offer which could be accepted by the corporation when it came into existence. The failure to formally accept or adopt the contract by formal action of the board of directors does not mean its adoption cannot be implied from conduct and circumstances following its incorporation. <u>If the corporation accepts the benefits of a contract made on its behalf by its promoters this amounts to an adoption and it must accept the contract and its burdens as well as its benefits.</u>" (Underscoring added.)